IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 413

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, HOUSTON INSULATION CONTRACTORS ASSOCIATION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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STATEMENT OF THE CASE

The factual basis for the question presented in this case No. 413 is set forth in the brief of Petitioner, Houston Insulation Contractors Association in No. 206 at pages 2 through 10. This brief is submitted in reply to that portion of the brief for the National Labor Relations Board filed in both Nos. 206 and 413 dealing with the refusal by members of Local 113 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, to apply pre-mitered fittings purchased by Armstrong Contracting & Supply Corporation from Thorpe Products Corporation in the course of insulating work at a plant under construction at Victoria, Texas.

QUESTION PRESENTED

The question presented in No. 413, properly stated in the context of the case, is:

> Whether a refusal by members of a local union to apply prefabricated materials purchased by their employer from an off job-site supplier is unlawful secondary activity where the prefabrication of the materials purchased had never been performed by members of the union, and the union had no contract and no dispute with the employer.

SUMMARY OF THE ARGUMENT

Because there was no primary dispute between either Local 113 or Local 22 and Armstrong, the strike having secondary boycott impact upon a neutral employer, Thorpe, was unlawful under *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951). Section 7 of the Act does not create a right to strike in aid of another union where there is no dispute between the striking union and the employer.

ARGUMENT

The argument of the Board that the work stoppage by Local 113 was lawful is based upon a crucial, yet false, assumption that there was a dispute between Local 113 and Armstrong. Respondent submits that Local 113 had no legitimate dispute with Armstrong which could be considered the object of lawful primary activity. The premitered fittings purchased by Armstrong from Thorpe had never been prepared by members of Local 113. By refusing to apply fittings purchased from Thorpe, Local 113 could not possibly have been attempting to preserve work done by its members. Local 113 has no jurisdiction over the Houston area where the shops of Armstrong are located in

which other employees of Armstrong had previously prepared pre-mitered fittings. Armstrong had no contract with Local 113 although it did have a contract with Local 22 containing provisions that Armstrong would operate under the rules and conditions established in localities outside of the jurisdiction of Local 22 by contracts between local unions and employers in such other localities. In contracts with employers in the jurisdiction of Local 113 there were provisions governing sub-contracting identical to those in the contract between Armstrong and Local 22.

On these facts, the Court of Appeals properly held that Local 113 was engaging in unlawful activity and ". . . . coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer . . ." In so holding, the court below cites *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951), (R. 242), but does not base its holding upon the rule expressed in that case that strike action or picketing is unlawful where "an object" thereof is to obtain a prohibited result. Nevertheless, the Court of Appeals states that where the effect of strike action by Local 113 is felt by a neutral employer, Thorpe, it is improper for Local 113 to engage in refusals to work on materials supplied by Thorpe in aid of another local which might be affected in the amount of work normally performed by its members.

The distinguishing factor in the opinion of the Court of Appeals and the decisions in *NLRB* v. *General Drivers, Local 968 (Otis Massey Co.)*, 225 F. 2d 205 (5th Cir. 1955), cert. denied, 350 U.S. 914 (1955), and *Milwaukee Plywood Co.* v. *NLRB*, 285 F. 2d 325 (7th Cir. 1960) is the impact of the strike conduct upon a neutral employer. It is submitted that the secondary boycott objective of the strike of Local 113 is clear in that even if Local 113 would have had a

legitimate work preservation objective, under *Denver Bldg. & Constr. Trades Council* the strike was unlawful. These arguments are set forth in full in the brief of Houston Insulation Contractors Association as Petitioner in No. 206.

It is difficult to reconcile the Board's laborious efforts to create some interest on the part of Local 113 which might legitimately be the subject of protection by strike action with its argument that no such interest is required. Unlike the decisions of lower courts and the NLRB upon which the Board relies, there was no primary dispute between Local 22 and Armstrong which was aided by the action of Local 113. This is purely an instance in which Local 113 engaged in strike conduct and thus created a previously non-existent dispute which was not, and could never be, its own. Section 7 of the Act (61 Stat. 136, 29 U.S.C. 151 *et seq.*) cited by the Board does not create the right of unions to engage in conduct such as shown by this record. That section merely creates the right of employees to organize and be members of unions. That right is subject to all of the limitations contained in other provisions of the Act. Although it is the position of Respondent that the Court of Appeals should have found the strike by Local 113 unlawful as a clear secondary boycott, the decision of the court below was correct in its assessment of the right of an employer to be protected from pressures brought by unions which had suffered no offense at the hands of the employer and to be protected from union pressure in controversies not their own.

CONCLUSION

The decision of the Court of Appeals finding the strike by Local 113 to be unlawful and remanding the case to the Board for further determination of the involvement of the International Union in such conduct should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Respondent were served upon Counsel for Petitioner and the Solicitor General of the United States by placing the same in the United States Mails, Air Mail, postage prepaid, addressed to such Counsel at their addresses of record this ..... day of December, 1966.

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